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## **UNITED STATES FOLLOWS CANADIAN LEAD AND TAKES AN UNEQUIVOCAL POSITION AGAINST FEMALE GENITAL MUTILATION: *IN RE FAUZIYA KASINGA***

### **I. INTRODUCTION**

On June 13, 1996, the Board of Immigration Appeals granted asylum to Fauziya Kasinga, a young woman who fled her West African homeland to prevent being subjected to Female Genital Mutilation (FGM).<sup>1</sup> Along with other countries and humanitarian organizations, the United States has taken an unequivocal position against FGM in announcing this decision. The Board of Immigration Appeals ruled that FGM is a form of persecution that could be a basis for a discretionary grant of political asylum.<sup>2</sup> Fauziya Kasinga became the fifth woman to be granted political asylum based on the fear of being forced to submit to FGM.<sup>3</sup> Previously, one woman was granted asylum by an immigration judge while three others had been granted asylum by immigration officials.<sup>4</sup> The decision of the twelve-member board was crucial because it set precedent for the 179 immigration judges in the United States who had been split on the issue.<sup>5</sup>

Even though this case is a landmark decision for the United States, Canada was actually the world's first country to grant political asylum to a woman fleeing FGM. In 1993, the Canadian IRB initiated guidelines to deal with gender-based claims of persecution in adjudicating

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1. See *In re Fauziya Kasinga*, 35 I.L.M. 1145 (1996).

2. See *id.* at 1147.

3. See *U.S. Ruling on Genital Mutilation Hailed Asylum for African Sets Precedent for Others*, CHI. TRIB., June 15, 1996, available in 1996 WL 2681345.

4. See *id.*

5. 8 C.F.R. § 3.1(g) (1995).

claims for asylum. As a result, Canada used these guidelines as a framework for granting asylum to women with gender-related claims. Thus, Canada was the world leader in recognizing that FGM could be a basis for a grant of asylum.

This note will present the positions taken by the United States and Canada in adjudicating asylum claims based on the applicants' imminent fear of FGM. Part II of this note discusses the background of FGM. Part III details the legislation enacted, policy interpretations, and case law in regard to discretionary grants of asylum and withholding of deportation. Part IV reveals the Canadian law and guidelines for adjudicating claims for asylum based on gender. Furthermore, the first case specifically addressing FGM as a basis for asylum will be detailed.

## II. FEMALE GENITAL MUTILATION

### A. Procedure

The little girl, entirely nude, is immobilized in the sitting position on a low stool by at least three women. One of them with her arm tightly around the little girl's cheeks: two others hold the child's thighs apart by force, in order to open wide the vulva . . . . The traditional operator says a short prayer . . . . Then the old woman takes her razor and excises the clitoris. The infibulation follows: the operator cuts with her razor from top to bottom of the small lip and then scrapes the flesh from the inside of the large lip . . . . Then the operator applies a paste and ensures the adhesion of the large lips by means of acacia thorns.<sup>6</sup>

It is estimated that between 85 and 114 million girls and women have been subjected to FGM.<sup>7</sup> Approximately six thousand girls or women are mutilated each day.<sup>8</sup> The majority of these women live in twenty-six African countries, Asia, Europe, Canada, and the United States. According to statistics compiled by UNICEF, the procedure is generally performed between the ages of four and ten,<sup>9</sup> but may be performed during infancy, adolescence, marriage, or during a first pregnancy.<sup>10</sup>

FGM covers a spectrum of various procedures.<sup>11</sup> The *clitoridectomy* procedure entails the partial or total removal of the clitoris. *Excision* is the removal of the clitoris and the labia minora.<sup>12</sup> These two forms

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6. *Female Circumcision; Because It's Always Been Done*, ECONOMIST, Sept. 18, 1982, at 56.

7. See *International Elimination of Female Genital Mutilation*, AIDS WKLY, June 20, 1994.

8. Ellen Goodman, *A Brave Woman Still is Not Safe*, SAN ANTONIO EXPRESS-NEWS, Apr. 10, 1996, available in 1996 WL 2828162.

9. See *International Elimination*, *supra* note 7.

10. See *id.*

11. See *id.*

12. See *id.*

of FGM affect approximately eighty-five percent of the women who have undergone the procedure.<sup>13</sup> *Infibulation* is the complete removal of the clitoris and labia minora as well as of the inner surface of the labia majora. The two sides of the vulva are then stitched together, leaving only a small opening.<sup>14</sup> This is the most extreme form of FGM and causes the most severe and long term damage to women's and girls' health.<sup>15</sup> The operation is often carried out with unsanitary instruments and generally without anesthesia.<sup>16</sup>

The procedure is normally performed by an elder of the village or community. In many African countries, the excisor is normally an elderly woman who has inherited the job from her ancestors.<sup>17</sup> In Egypt, midwives and barbers have been known to administer the procedure.<sup>18</sup> Prior to the practice being outlawed in Egypt, the procedure was allowed to be performed in city hospitals.<sup>19</sup> The purpose of performing the procedure in the hospital was to reduce death and infections that resulted from the known unsanitary procedures in the villages.<sup>20</sup>

## B. Purposes of FGM

### 1. Religion v. Tradition

The majority of communities that practice FGM believe that female genital mutilation is an approved religious practice of Islam.<sup>21</sup> Some Islamic scholars have proclaimed that a woman can not be a proper Muslim if she is not circumcised.<sup>22</sup> Moreover, they proclaim that women who have not undergone the procedure are spiritually unclean from the Islamic perspective.<sup>23</sup> In the African country of Burkina Faso, women who do not submit to FGM are not granted decent religious burials.<sup>24</sup>

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13. *See id.*

14. *See International Elimination, supra* note 7.

15. *See id.*

16. *See id.*

17. ALICE WALKER & PRATIBHA PARMAR, *WARRIOR MARKS* 301 (1996) (interview with excisor).

18. *Egypt Rights Group Praises Female Circumcision Ban*, REUTERS NORTH AMERICAN WIRE, July 23, 1996, available in LEXIS, News Library, Curnws File.

19. *Egypt Lobbyists Say Female Circumcision Common*, REUTERS WORLD SERVICE, Apr. 17, 1995. *See also* Nabil Megalli, *Circumcision Persists as Insult and Injury to Femininity*, DEUTSCHE PRESSE AGENTUR, Sept. 12, 1994.

20. *See id.*

21. *See* WALKER & PARMAR, *supra* note 17, at 325 (interview with Islamic Scholar, Baba Lee, who opposes female genital mutilation).

22. *See id.*

23. *See id.*

24. *See* Brahim Ouedraogo, *Burkina Faso: Tradition Frustrates Anti-Circumcision Campaign*, INTER PRESS SERVICE, July 10, 1992, available in LEXIS, News Library,

According to Sheik Usif al-Badri, an Islamic preacher, anti-FGM groups have misguided Islamic scholars to support their own cases against FGM.<sup>25</sup> In addressing a female reporter, Badri stated:

Circumcision does not kill. What causes harm is that the person performing it is not specialized and that's why we call for doctors and nurses who can perform it and know when it is needed and what to remove.

Circumcision is a form of medicine and is performed on girls who need it. At the age of 10, if it is found that a girl's clitoris has elongated like a man's penis, the extra part must be taken off but not completely . . .

It has been proven that if all the clitoris is removed or if it is not removed at all a woman's face takes on a sallow complexion. But if the extra part is removed . . . her complexion is rosy, her cheeks are red as apples, not like your yellow ones . . .<sup>26</sup>

Pro-FGM scholars attempt to justify their position by noting the alleged history of FGM. It is believed that when the prophet Mohammed migrated from Mecca to Medina he met a woman that had performed the procedure.<sup>27</sup> The prophet told the woman, "[i]f you do this again, be very careful of the way you do it."<sup>28</sup> Mohammed then proceeded to give her instructions on how the procedure was to be performed in order to lessen the severity of the procedure.<sup>29</sup> Therefore, Muslim women are made to believe that this is a *sunna*, or a practice based on the prophet's words.

However, a noted Islamic scholar has proclaimed that this tale lacks a reasonable degree of authenticity.<sup>30</sup> Female circumcision is neither encouraged nor recommended by Islam. The tradition was practiced before the inception of Islam,<sup>31</sup> and is neither mentioned in the Koran nor is it a practice based on the prophet's words and deeds or an obligation.<sup>32</sup> Furthermore, FGM is unknown in a majority of Muslim countries. The practice is concentrated in Egypt, Sudan, and coun-

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Curnws File.

25. See Mona Eltahawy, *Group Sues Muslim Leaders over Female Circumcision*, REUTERS NORTH AMERICAN WIRE, July 8, 1995, available in LEXIS, News Library, Curnws File.

26. *Id.*

27. See WALKER & PARMAR, *supra* note 17, at 326.

28. *Id.*

29. See *id.*

30. See *Islam in Perspective: Female Circumcision*, MONEY CLIPS, Mar. 4, 1994, available in LEXIS, News Library, Curnws File.

31. See WALKER & PARMAR, *supra* note 17, at 325.

32. See *id.*

tries to the south of the Sahara.<sup>33</sup> In these countries, FGM is a matter of tradition and not religion.<sup>34</sup>

## 2. Male Domination and Control

FGM subjects women to subservient roles in societies dominated by men. In communities that practice FGM, women are a sub-class who depend on their husbands for their livelihood, protection, and social status. If the woman or girl does not submit to having the procedure performed, then she must accept a lifetime of ostracism.<sup>35</sup> The majority of the men in these communities will refuse to marry a woman that is not circumcised. In a community where marriage is the means of survival, the inability to marry could be detrimental to a woman's livelihood and existence.<sup>36</sup> As a result of not being able to marry, women are labeled prostitutes and ostracized by their communities.<sup>37</sup>

Furthermore, women become tools by which men use to perpetuate this age-old practice. Most mothers subject their daughters to the pain that they had once felt because the tradition is so ingrained.<sup>38</sup> If the mothers protested the procedure they could run the risk of banishment from the village or community or risk losing their life.<sup>39</sup> In order to desensitize themselves to the procedure that they inflict upon their daughters, the women pretend to be men. After the procedure has been performed, the mothers sing the following song to their daughters:

*We used to be friends, but today I am the master, for I am a man. Look—I have the knife in my hand, and I will operate on you. Your clitoris, which you guard so jealously, I will cut off and throw away, for today I am a man.*<sup>40</sup>

These women emotionally transform themselves into men and take on a male persona in order to participate in the ritual.<sup>41</sup>

Moreover, men use FGM as a mean's of suppressing the woman's sexuality. The clitoris was believed to be evil and if left intact would become elongated and cut a man's penis during intercourse.<sup>42</sup> According to Dr. Jean Lakouandi of Yalgado National Hospital, "[t]he practice has its roots in the traditional belief that a woman with her clitoris

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33. See *Islam in Perspective*, *supra* note 30.

34. See *id.*

35. See Editorial, *Female Mutilation A Case for Asylum*, ARIZ. REPUBLIC, May 2, 1996, available in 1996 WL 7704205.

36. See *id.*

37. See WALKER & PARMAR, *supra* note 17, at 277.

38. See *id.* at 178.

39. See *id.* at 173.

40. *Id.* at 178.

41. See *id.* at 179.

42. See *id.* at 110.

intact cannot have children and cannot be faithful to her husband."<sup>43</sup> When the clitoris is removed, the woman's sexual desires are reduced; however, virginity is assured to her husband and she will bring her family a handsome price upon marriage.<sup>44</sup> The purpose of infibulation is also to ensure chastity until marriage.<sup>45</sup> Furthermore, the reduction in size of the vaginal orifice is to increase the husband's sexual pleasure while decreasing that of his wife's.<sup>46</sup>

### C. Medical Consequences

There are numerous health related consequences of FGM. The most noted complications are severe pain, hemorrhaging, urinary retention, infection of the wound, and damage to adjacent tissues and organs.<sup>47</sup> The most severe complications are sepsis, shock, and tetanus.<sup>48</sup> Due to the use of unsterile instruments, HIV and hepatitis B can be transmitted.<sup>49</sup> FGM can even result in death.<sup>50</sup>

There are also long-term consequences of FGM that could persist throughout a woman's lifetime. The long-term effects include: urinary tract infection, chronic pelvic infection leading to infertility, as well as other serious disorders of sexual and reproductive health.<sup>51</sup> Medical consequences in relation to pregnancy are also common. Women subjected to FGM often experience severe tearing of the perineum during childbirth.<sup>52</sup> Some women even require defibulation to allow for the passage of their child.<sup>53</sup> If this procedure is not performed, labor is often prolonged and may result in fetal asphyxia with the risk of brain damage to the child.<sup>54</sup> These women are later re-infibulated after the delivery.

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43. Ouedraogo, *supra* note 24.

44. See J.A. Black & G.D. Debell, *Genital Mutilation in Britain*, 310 BRIT. MED. J., 1590 (1995).

45. See *id.*

46. See *id.*

47. See *International Elimination*, *supra* note 7.

48. See *id.*

49. See *id.*

50. In July 1996, a ten year old Egyptian girl died after being subjected to FGM. The girl died from heavy bleeding after her father took her to a barber to have her external genitalia excised. *Female Circumcision Claims More Victims in Egypt*, DEUTSCHE PRESSE-AGENTUR, July 14, 1996, available in LEXIS, News Library, DPA File.

51. See *International Elimination*, *supra* note 7.

52. See *id.*

53. See *id.*

54. See *id.*

#### *D. Eliminating FGM*

Countries in Africa have initiated an alliance to publicly renounce FGM. Inter-African Committee on Harmful Traditional Practices held a workshop in July 1996, to discuss the elimination of FGM and other unhealthy practices of African women.<sup>55</sup> The organization has established twenty-six national committees for health reform.<sup>56</sup> FGM often affects girls too young to protect themselves. These girls are overcome by pressures from their communities and families. Therefore, the families must be educated first about the detrimental effects of FGM. The women of these communities will have to speak out against the age old practice before the procedure is abolished.<sup>57</sup>

FGM is an outlawed procedure in numerous countries in Europe.<sup>58</sup> In France, a court sentenced a Gambian mother to jail for having her two baby daughters genitally mutilated.<sup>59</sup> This was the first reported case of an African parent being sent to prison for having the ritual performed.<sup>60</sup> In 1992, a midwife from Mali was sentenced to eight years in prison after three babies on whom she operated bled to death.<sup>61</sup>

On May 1, 1996, the United States enacted legislation making FGM a federal crime.<sup>62</sup> FGM was pronounced to be a crime punishable by fines or up to five years imprisonment.<sup>63</sup> Despite laws that have been enacted worldwide prohibiting FGM, there is speculation that the laws are ineffective in protecting women and girls from this hideous practice. Since finding that the fear of FGM establishes sufficient grounds for political asylum, Canada has seen a growth in the procedure practiced within the country.<sup>64</sup> Women who have been granted political asylum have brought family members to live in the country

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55. See *Inter-African Health*, XINHUA ENG. NEWSWIRE, June 17, 1996, available in 1996 WL 10549060.

56. See *id.*

57. See *Why the Problem Continues in Britain*, 310 BRIT. MED. J. 1593 (1995).

58. See Guido de Bruin, *Women: Dutch Government Ends Debate on Circumcision Proposal*, INTER PRESS SERVICE, Nov. 11, 1992, available in LEXIS, News Library, Cumwvs File.

59. See Marlise Simons, *France Jails Woman for Daughters' Circumcisions*, N.Y. TIMES, Jan. 10, 1993, at A8.

60. See *id.* The police were unable to locate the midwife that performed the procedure; therefore, she was not criminally charged along with the mother. Seven previous mutilation trials were held in France; however, Mrs. Jahate, was the first to be sentenced to a jail sentence. The other parents were all given suspended sentences for their involvement in the mutilation of their daughters. See *id.*

61. See *id.*

62. See *Senate OKs Federal Law on Genital Mutilation*, PATRIOT LEDGER, May 2, 1996, available in 1996 WL 8041349.

63. See *id.*

64. See *id.*



who may still believe in the practice.<sup>65</sup> Nonetheless, the Clinton Administration has firmly proclaimed that the United States is "a safe haven for women with justifiable fears of torture of female genital mutilation."<sup>66</sup>

### III. U.S. IMMIGRATION LAW

#### A. *Statutes, Protocols, and Other Policies Pertaining to Grants of Asylum and Withholdings of Deportation*

In 1968, the United States signed the United Nation's Protocol Relating to the Status of Refugees,<sup>67</sup> which incorporated the 1951 United Nation's Convention Relating to the Status of Refugees.<sup>68</sup> In 1980, Congress adopted the Refugee Act of 1980 which incorporated the United States protocol obligations. The Act gave the Attorney General discretionary authority to grant political asylum to any person who met the statutory definition of refugee.<sup>69</sup>

In order to establish eligibility for a grant of asylum, an alien must demonstrate that he is a "refugee" within the meaning of section 101(a)(42)(A) of the Act, 8 U.S.C. 1101(a)(42)(A)(1992).<sup>70</sup> A grant of asylum provides the refugee with only temporary refuge in the United States. However, the refugee will have the opportunity to obtain permanent refuge in order to become a permanent resident. An alien denied asylum as a matter of discretion may still qualify for withholding of deportation under section 243(h) of the Act.

The Immigration and Nationality Act affords an alien the remedy of withholding deportation as an alternative to grants of asylum. An alien who seeks withholding of deportation from any country must show that his life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social

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65. *See id.*

66. *See Female Mutilation A Case for Asylum, supra* note 35.

67. 1967 United Nation's Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223.

68. Convention Relating to the Status of Refugees, July 28, 1951, art. 1 (A)(2), 189 U.N.T.S. 137. Defines a refugee as someone who has a well founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion.

69. Immigration and Nationality Act § 101(a)(42), 8 U.S.C. § 1101(a)(42)(A)(1994).

70. *See id.* Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . . *See id.*

group, or political opinion.<sup>71</sup> To make this showing, the alien must establish a "clear probability" of persecution on account of one of the enumerated grounds.<sup>72</sup> The standard requires a showing that it is more likely than not that an alien would be subjected to persecution.<sup>73</sup> Unlike grants of asylum, withholding of deportation is mandatory upon satisfaction of the required elements, unless he is not eligible under the provision of section 243(h)(2).<sup>74</sup> The alien cannot then be returned to the country where he would face persecution. However, he can be sent to another country under certain circumstances.<sup>75</sup>

### *B. Case Law Interpreting Statute: In Re Acosta*

In *In re Acosta*, the Board of Immigration Appeals analyzed the statutory standard for asylum.<sup>76</sup> As stated, a grant of asylum is a matter of discretion. Section 208 of the Act creates four separate elements that must be satisfied before an alien could qualify as a refugee: (1) the alien must have a fear of persecution; (2) the fear must be well-founded; (3) the persecution feared must be on account of race, religion, nationality, membership in a particular social group, or political opinion; and (4) the alien must be unable or unwilling to return to his country of nationality or to the country in which he last habitually resided because of persecution or his well-founded fear of persecution.<sup>77</sup>

#### 1. Persecution

Persecution as used in the Act clearly contemplates that harm or suffering must be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome.<sup>78</sup> The word does not embrace harm arising out of civil strife or anarchy.<sup>79</sup>

#### 2. Well-Founded Fear

In *Acosta*, the Board held that the "clear probability" of persecution standard employed for withholding of deportation<sup>80</sup> under section 243(g) of the Immigration and Nationality Act, may be equated with

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71. 8 U.S.C. § 1253(h)(1) (1992).

72. See *INS v. Stevic*, 467 U.S. 407, 413 (1984).

73. See *id.* at 429-30.

74. See § 243(h)(2).

75. See § 243 (h)(1) of the Act, 8 U.S.C. § 1253 (h)(1) (1992).

76. *In re Acosta*, 19 I. & N. Dec. 211 (1985).

77. *Id.* at 219.

78. See *id.* at 234.

79. See *id.* at 233.

80. See *id.* (citing Immigration and Nationality Act at § 243(h)).

the "well-founded fear" of persecution standard used for asylum.<sup>81</sup> However, in *INS v. Cardoza Fonseca*,<sup>82</sup> the Supreme Court held that the standards do not converge and may not be equated with one another. In *In re Mogharrabi*, the Board held that the "well-founded" fear of persecution standard used in the Act for grants of asylum is significantly different from the clear probability standard used for withholding of deportation.<sup>83</sup> The court found it reasonable to assume that Congress intended to make it more difficult to establish absolute entitlement to withholding of deportation than to mere asylum.<sup>84</sup> An applicant for asylum has established a well-founded fear if a reasonable person in his circumstances would fear persecution.<sup>85</sup>

### 3. Social Group

To be granted asylum status, the alien must place herself within one of the five enumerated categories of the Refugee Act of 1980. Women who seek asylum status based on gender-related claims have attempted to classify their claim under the social group category. The "social group" category was incorporated as a "catch-all" for individuals not falling into the first four categories of political opinion, race, religion, or ethnicity.<sup>86</sup> Applying the doctrine of *ejusdem generis*,<sup>87</sup> the Board elaborated upon the meaning of the enumerated group of "social group." The Board interpreted the phrase "persecution on account of membership in a particular social group" to mean persecution that is directed toward an individual who is a member of a group of persons all of whom shared a common, immutable characteristic. The shared characteristics might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever this construction, the common characteristic that defines the group, must be one that the members of the group either cannot change, or

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81. See Immigration and Nationality Act, § 208, 8 U.S.C. § 1158 (1982).

82. *INS v. Cardoza Fonseca*, 480 U.S. 421 (1987).

83. *In re Mogharrabi*, 19 I. & N., 439 Dec.(1987).

84. See *id.* at 411.

85. See *id.* at 445 (citing *Guevera Flores v. INS*, 786 F.2d 1242, 1249 (5th Cir. 1986)).

86. Kristin E. Kandt, *United States Asylum Law: Recognizing Persecution Based on Gender Using Chada as a Comparison*, 9 GEO. IMMIGR. L.J. 137, 145 (1995).

87. Under the "ejusdem generis" canon of statutory construction, where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated. BLACK'S LAW DICTIONARY 517 (6th ed. 1990).

should not be required to change because it is fundamental to their individual identities or conscience.<sup>88</sup>

In a recent decision, the Board specifically addressed the category of particular social group persecution. In *In re H-*, the Board held that membership in an identifiable Somali subclan group and that harm suffered on account of that membership constitutes persecution.<sup>89</sup> Thus, the Board specifically mentioned "sex" as an innate characteristic that could link the member of a "particular social group."

Recently, the Board has concluded that Haitian women, raped for political retribution, can set forth claims which deserve and warrant protection within our laws. This ruling is consistent with U.S. law interpreting this term. In *Fatin v. INS*, an Iranian woman filed an application for asylum based on the fear that she would be persecuted for violating a gender-related law.<sup>90</sup> The application was denied and the Iranian woman petitioned for a review of the order to the Board of Immigration and Appeals requiring her departure and deportation. The court held that it could be found that she belonged to a "particular social group," consisting of Iranian women who refuse to conform to the Iranian Government's gender specific laws. Therefore, these social norms may well satisfy the *Acosta* definition.<sup>91</sup>

The recognition of a particular social group based upon gender is in harmony with the guidelines for adjudicating women's asylum claims issued by the Immigration and Naturalization Service.<sup>92</sup> On May 25, 1995, the INS issued a memorandum entitled *Considerations for Asylum Officers Adjudicating Asylum Claims from Women*.<sup>93</sup> The memorandum was inspired as a result of the Guidelines on Protection of Refugee Women issued by the United Nations High Commissioner for Refugees in 1991.<sup>94</sup> The guidelines state that rape . . . , sexual abuse and domestic violence, infanticide and genital mutilation are forms of mistreatment primarily directed at girls and women and they may serve as evidence of past persecution on account of one of the five enumerated grounds.<sup>95</sup> The guidelines recognize the importance of gender-based

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88. See WALKER & PARMAR, *supra* note 17, at 233.

89. *In re H-*, A73 149072 Interim Decision BIA 3276 (May 30, 1996).

90. *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993).

91. See *id.* at 1241. However, the third element was not satisfied; that is, she had not shown that she would suffer or that she had a well-founded fear of suffering 'persecution.' See *id.*

92. Coven, U.S. Dep't of Justice, *Considerations for Asylum Officers Adjudicating Claims From Women* (1995).

93. See *id.*

94. Guidelines on the Protection of Refugee Women, Office of the United Nations High Commissioner on Refugees, U.N. Doc. ES/SCP/67 (1991).

95. See Coven, *supra* note 92.

claims in light of international human rights instruments and the framework they provide.<sup>96</sup> The gender-based guidelines are developments in refugee protection and its guidelines are a natural and multifaceted outgrowth of guidelines and other sources of expertise including the Women's Refugee Project of the Harvard Immigration and Refugee Program.<sup>97</sup>

### C. *The Oluloro Decision*

On March 23, 1994, an Immigration Judge granted Lydia Omowunmi Oluloro's application for suspension of deportation, but fell short of granting her asylum.<sup>98</sup> The judge found that Lydia had established a strong likelihood that her daughters would be subjected to FGM if she was required to return to Nigeria. The court held that this risk amounted to "extreme hardship" to Oluloro's native born children; thus meeting the statutory requisites for withholding of deportation.<sup>99</sup>

Lydia entered the United States on September 28, 1986, in New York City.<sup>100</sup> Lydia came to America to reside with her husband, Emanuel Oluloro.<sup>101</sup> Upon Emanuel's request, Lydia entered the United States as a visitor for pleasure (B-2 status).<sup>102</sup> Lydia and Emanuel remarried in Vancouver, Washington, on February 17, 1987.<sup>103</sup> On May 7, 1987, their first child was born in the United States, whom they named Folashade. Soon after the birth of Folashade, Emanuel began to mistreat Lydia and their relationship deteriorated as time progressed. On February 12, 1989, their second child, Omolara, was born. After Omolara's birth, Emanuel began to physically abuse Lydia.<sup>104</sup>

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96. *See id.*

97. *See id.*

98. *In re Oluloro*, Portland Oregon, No. A72 147 491 at 20 (Mar. 23, 1994) (oral decision).

99. *See id.* at 17.

100. *See id.* at 7. Lydia was born in Ilobu, in the state of Oyo, Nigeria.

101. *See id.* at 6. The couple married in Nigeria in 1996. Emanuel was a permanent resident citizen of the United States. *See id.*

102. *Id.* at 6, 7. Emanuel told Lydia to obtain a non-immigrant visa and told her to come to the United States as a visitor. Emanuel further told Lydia not to inform the customs officials that she was married to a lawful permanent resident. Lydia did as her husband instructed. Lydia was authorized to remain in the US until March 27, 1987. *See id.*

103. *See id.* at 7. Emanuel came to the United States in 1980 as a non-immigrant student. He obtained a degree in business administration from Norfolk State University. Emanuel married an American citizen in order to be granted permanent resident status. Therefore, when Lydia came to the United States he had to obtain a divorce from his first wife before their marriage could be recognized as legal in the United States. *See id.* at 11.

104. *See Oluloro*, A72 147 491 at 7. On one occasion, Emanuel threatened Lydia with a knife and stabbed her with a screwdriver. Emanuel tore her nightgown and

Folashade later informed her mother that their father was also being physically abusive toward her and Omolara.<sup>105</sup> On March 27, 1993, the couple divorced.<sup>106</sup>

When Lydia entered the United States in 1986, she was only authorized to remain as a non-immigrant visitor until March 27, 1987. Obviously, Lydia remained in the United States longer than was originally authorized.<sup>107</sup> On April 26, 1993, an Immigration Judge ordered her deported from the United States. Through counsel, Lydia applied for suspension of deportation, with asylum, withholding of deportation, and voluntary departure in the alternative.<sup>108</sup>

On March 23, 1994, the Board presented their oral decision. The court first considered the application for suspension. In order to qualify for suspension of deportation, an applicant must prove that she has resided in the United States for seven years immediately preceding the application; she must have demonstrated good moral character; and that her deportation would amount to extreme hardship to her, her United States citizen or permanent resident spouse, parent, or child.<sup>109</sup> The burden of proof is on the applicant to demonstrate eligibility for suspension of deportation.<sup>110</sup>

In Lydia's case, the court held that she clearly satisfied the first two requirements. Lydia had resided in the United States for seven years prior to her application and she was able to demonstrate good moral character.<sup>111</sup> However, the court analyzed the issue of whether Lydia could demonstrate that deportation would amount to extreme hardship to her and her children. At the pretrial hearing, Lydia asserted

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forced her to have sex with him. Lydia called the police and Emanuel was subsequently arrested. Emmanuel testified that he spent eight days in jail. The case went to the grand jury but was held to lack sufficient evidence to support the charges. The charges were later dropped. *See id.* at 11.

105. *See id.*

106. *See id.*

107. *See id.* at 1.

108. *See id.* at 2. Suspension of deportation is the most beneficial form of relief that Lydia could have received. Suspension of deportation leads to lawful permanent resident status. With seeking a claim for asylum, Lydia would have the status of an asylee, and then possibly a permanent resident. Withholding of deportation confers no citizenship status upon the individual. Lydia would be allowed to remain in the United States as long as the persecution that she fears is still viable in Nigeria. Voluntary departure would allow Lydia to leave the United States on her own volition and not be deported by the authorities. *See id.*

109. Immigration & Nationality Act, § 244(a)(1).

110. *See Oluloro*, A72 147 491 at 15. If the alien is able to satisfy these criteria, the grant of suspension of deportation is not automatic. Suspension of deportation is a matter of discretion. Therefore, the applicant must also demonstrate that she deserves a favorable grant of discretion. *See id.*

111. *See id.*

that her deportation to Nigeria would amount to extreme hardship because her daughters would be forced to undergo FGM if returned to that country.<sup>112</sup>

Whether extreme hardship is proved depends on the facts and circumstances of the individual case. It has been determined that extreme hardship amounts to more than the hardship that an alien suffers by having to leave the United States. The Supreme Court has held that extreme hardship depends upon the exceptional nature of the suspension remedy.<sup>113</sup> Economic hardships are insufficient as is the existence of a U.S. citizen child.<sup>114</sup>

In making this determination, the BIA has set forth specific criteria to be applied. Among the facts to be considered are age, familial relations in the U.S., length of residence, condition of health, whether the subject is of special assistance to the community, and her immigration history and position in the community.

After taking these criteria into consideration, the Board concluded that Lydia had barely met the statutory minimum; however, she had adapted well to her community and remained gainfully employed.<sup>115</sup> However, the factors that weighed heavily in her favor were the existence of her two native born children. At the hearing, the eldest daughter testified and appeared well adjusted. She spoke English without the detection of an accent. Both children had many friends and were doing well in school.

Furthermore, the Board considered relevant Lydia's testimony at the hearing. Lydia testified that she would not have control over her life in Nigeria. Because no welfare program exists in Nigeria, Lydia would also have to depend on her family for financial support and childcare. Lydia would have to find a job. Lydia testified that her sister firmly believed in FGM.<sup>116</sup> Lydia feared that while she was away at work one day, her sister would have her daughters circumcised.<sup>117</sup> At the age of four, Lydia had been circumcised and did not want her daughters to suffer the same fate.<sup>118</sup> When her daughters were born, Lydia testi-

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112. See *id.* at 10. Through her attorney, Tillman Hasche, Lydia submitted a copy of the 1993 State Department Country Reports for Human Rights Practices. The document stated that the Nigerian government officially opposes FGM. However, it was so noted that an estimated fifty percent of the women in Nigeria have had the procedure performed. See *id.* at 4.

113. See *id.* at 15.

114. See *id.*

115. See *id.* at 16.

116. See *Oluloro*, A72 147 491 at 10.

117. See *id.*

118. See *id.* at 7. Lydia testified that she is not able to remember undergoing the procedure. A gynecological report dated August 4, 1993, confirmed that the pro-

fied that she made the decision not to have FGM performed on them.<sup>119</sup> Furthermore, Lydia testified that her ex-husband's family would harm her in retaliation for all the events that proceeded their divorce.<sup>120</sup> There even existed the possibility that she might be jailed.<sup>121</sup>

Taking this testimony into account, the court concluded that Lydia had established a strong likelihood that her daughters would be subjected to FGM if she returned to Nigeria.<sup>122</sup> The court held that this risk amounted to extreme hardship to the U.S. citizen children. Accordingly, the court concluded that Lydia's application for suspension of deportation should be granted, and that it would not be necessary to address the other applications she filed.<sup>123</sup>

#### D. *In Re Fauziya Kasinga*

In *In re Fauziya Kasinga*, the BIA granted asylum to a young woman from the Tschamba-Kunsuntu Tribe of Northern Togo who fled persecution by female genital mutilation.<sup>124</sup> Despite the INS' request that the Board adopt a broad "framework of analysis" for claims of this type, the Board drew upon the traditional principles of asylum jurisprudence to adopt a framework consistent with the Refugee Act.<sup>125</sup> On August 25, 1995, an Immigration Judge denied Kasinga's applications for asylum and withholding of deportation.<sup>126</sup> The judge ordered Kasinga excluded and deported from the United States. The BIA reviewed the judge's decision "de novo" and granted her application for asylum.<sup>127</sup> However, the BIA limited its decision to the facts presented before them. The BIA declined to speculate on or establish rules not before the board.<sup>128</sup> The issues presented by the par-

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tective hood over Lydia's clitoris had been removed. *See id.* at 7-8.

119. *See id.* at 8. Lydia testified that she did not like the practice because of the danger and pain involved in the procedure. She also testified that she has problems with a rash that she attributed to as a consequence of her undergoing FGM. Lydia had witnessed the procedure being performed and was traumatized. *See id.*

120. *See id.* at 10. Lydia believed that Emanuel's family would cast a voodoo spell upon her that could harm or possibly kill her. She also indicated that they may even physically beat her in retaliation for having him arrested, put in jail, and for the publicity surrounding the hearing. *See id.*

121. *See id.* At the hearing, Susan Rich (an expert on African culture) testified that because Lydia had charged her husband with rape, that she could suffer serious repercussions in Nigeria. *See id.* at 5.

122. *See Oluloro*, A72 147 491 at 17.

123. *See id.* at 20.

124. *In re Kasinga*, 35 I.L.M. 1145 (1996).

125. *See id.*

126. *See id.* at 1147.

127. *See id.*

128. *See id.* The service asked that the board adopt a framework of analysis



ties concerned the need for remand concerning the credibility of Kasinga and the precise argument for FGM to constitute a basis for asylum on this record.<sup>129</sup>

The court made seven major findings when granting asylum to Kasinga. First, the Board held that Kasinga was a credible witness. Second, FGM, as practiced by the Tschamba-Kunsuntu Tribe of Togo and documented in the record, constitutes persecution. Third, Kasinga is a member of a social group consisting of young women of the Tschamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice. Fourth, the applicant has a well-founded fear of persecution. Fifth, the persecution the applicant fears is "on account of" her social group. Sixth, Kasinga's fear of persecution was country-wide, and seventh, she should be granted asylum in the exercise of discretion.<sup>130</sup>

## 1. Credibility

### a. Applicant's Testimony

At the time of her application, Kasinga was a nineteen year-old native and citizen of Togo.<sup>131</sup> She testified that young girls in her tribe normally are subjected to FGM at fifteen years old. Kasinga was protected from FGM because her father opposed the practice.<sup>132</sup> Unfortunately, her father died and Kasinga was left to live with her aunt who approved of the practice and had undergone the procedure herself. Kasinga's mother was forced to leave the Tribe and moved to live with relatives in Benin.<sup>133</sup>

Kasinga further testified that her aunt forced her into a polygamous marriage when she was seventeen years old.<sup>134</sup> The man was selected by her aunt and was forty-five years old with three other wives. Under tribal custom, her aunt and her husband planned to force her to undergo FGM before the marriage was consummated.<sup>135</sup> Because Kasinga

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which is specifically intended to address issues, such as past persecution questions, that are not presented by the facts of this case. The Board determined that it could more appropriately address the issue through the legislative or regulatory process, not the Board's adjudication process. *See id.*

129. *See id.*

130. *See Kasinga*, 35 I.L.M. at 1147.

131. *See id.*

132. *See id.*

133. *See id.*

134. *See id.* Kasinga submitted a translated copy of the marriage certificate. The certificate is dated October 7, 1994 and is only signed by the husband. Kasinga also submitted a picture of herself in the tribal ceremonial dress. *See id.* at 1148.

135. *See id.* Kasinga submitted a letter dated August 24, 1995, from Charles Plot, Assistant Professor of Cultural anthropology at Duke University. The letter of-

feared imminent FGM, she fled to Ghana with the assistance of her sister. However, Kasinga feared that her aunt and husband would find her in Ghana, so with the assistance of her mother she fled to Germany.<sup>136</sup>

When Kasinga arrived in Germany she roamed the airport seeking fellow Africans who could help her. Kasinga began a conversation with a woman in English and told her of her plight.<sup>137</sup> The woman took Kasinga into her home for two months. Finally, Ms. Kasinga met a man from Nigeria and she explained her situation to him. The Nigerian man offered to sell Kasinga his sister's British passport so that she could seek asylum in the United States. Kasinga purchased the passport and purchased a ticket to the United States.<sup>138</sup> Upon arrival into the United States at the Newark International Airport on December 17, 1994, Kasinga did not use the passport that she had purchased. Instead, Kasinga immediately requested asylum.<sup>139</sup>

#### b. INS Request for Remand

The INS requested that the record be remanded for further examination of the applicant's credibility.<sup>140</sup> The INS cited four matters in support of its request. First, the INS asserted that Kasinga's testimony was inconsistent because she gave different accounts of who performs FGM in her tribe.<sup>141</sup> Kasinga stated on two different occasions that an older man of the tribe performed the procedure and then an older lady of the tribe performed the procedure.<sup>142</sup> However, the Board found that these statements were not major inconsistencies. Kasinga was protected from FGM by her father and had no actual knowledge of the process; therefore, her imperfect memory had no reflection on her credibility.<sup>143</sup>

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ferred the opinion that a woman of the Tchamba tribe would probably be expected to undergo FGM prior to being married. *See id.* at 1148.

136. *See Kasinga*, 35 I.L.M. at 1147. Kasinga submitted two letters from her mother. One letter confirms that her father's family wished for her to marry an older man and submit to FGM. The letter also confirms that Kasinga's mother gave her money to leave the country. The second letter confirms her testimony that the police were looking for her since her escape. *See id.* at 1148.

137. *See id.* at 1147.

138. *See id.* at 1148.

139. *See id.*

140. *See id.* at 1150. The INS did not argue that Kasinga's testimony was incredible, nor did they assert that the Immigration Judge's adverse credibility finding was correct. *See id.*

141. *See id.*

142. *See Kasinga* 35 I.L.M. at 1150.

143. *See id.*

Second, the INS asserted that there was a material discrepancy in the testimony regarding her marital status.<sup>144</sup> The record established that Kasinga was married against her will and the marriage was never consummated.<sup>145</sup> In her asylum application, Kasinga stated that she "would be forced to marry an old man and be circumcised." The Board found that in the mind of a teenage girl, it was reasonable to believe that she was married. The Board concluded that the testimony was consistent and credible concerning the validity of her marital status.

Third, the INS challenged the credibility of an untranslated document offered by Kasinga.<sup>146</sup> An untranslated document in French from the Togo Police was introduced into the record by Kasinga. However, Kasinga did not rely on the document nor did the INS object to its introduction or cross-examine Kasinga concerning its validity.<sup>147</sup> The Board found that the INS had an opportunity to inquire about the document's validity before the Immigration judge and did not.<sup>148</sup> Therefore, the INS should not be entitled to address this issue at this stage of the process.<sup>149</sup>

Fourth, the INS contended that Kasinga's answers on both direct and cross exam were "inaudible."<sup>150</sup> The Board found that there was significant testimony that was audible. The portions of the testimony that were inaudible would not likely be relevant in impeaching the existing testimony.<sup>151</sup>

For the above reason, the Board found that a remand was not necessary.<sup>152</sup> In making this decision the Board also considered the length of time Kasinga's asylum application had been pending.

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144. *See id.*

145. *See id.*

146. *See id.*

147. *See Kasinga*, 35 I.L.M. at 1150.

148. *See id.*

149. *See id.*

150. *See id.*

151. *See id.* The Board also notes that there were INS officials present at the hearings when the testimony was given. The INS officials had the opportunity to submit affidavits or declaration from its general attorney if they questioned the audibility of her testimony at the time. *See id.*

152. *See id.* Concurring opinion. The judge states that it would have been preferable that Kasinga could offer corroboration of her story. However, the unresolved questions are not enough to justify an adverse credibility determination. Further, the Service has raised concerns for the first time on appeal. These suspicions did not warrant a remand in this case. *See id.* at 1154.

### c. Credibility

The Board conducted an independent review of Kasinga's application. The Immigration Judge based his adverse credibility determination on perceived lack of "rationality," "persuasiveness," and "consistency."<sup>153</sup> Because the Immigration judge did not base his decision on Kasinga's demeanor, the Board gave no deference to his findings.

The Board rejected the Immigration Judge's findings that Kasinga was not credible. The Immigration Judge could not believe that Kasinga did not know her mother's whereabouts; that her father protected her from FGM; the time she spent with the German woman; or the encounter with the Nigerian man. The judge found all of these events to be "irrational, unpersuasive, or inconsistent." However, the Board found that Kasinga adequately explained these issues.<sup>154</sup> The Board held that these events could have happened to a teenage girl under the same or similar circumstances and deemed her testimony credible.<sup>155</sup>

### 2. FGM as Persecution

According to Kasinga's testimony, FGM as practiced by the Tchmamba-Kunsuntu tribe is of an extreme nature.<sup>156</sup> The procedure entails the cutting of the genitalia with knives, extensive bleeding, and a forty-day recovery period.<sup>157</sup> This extreme form of FGM can cause permanent damage and physical complications.

The record contained a report compiled by the INS Resource Information Center entitled FGM Alert.<sup>158</sup> The FGM Alert notes that "few African countries have officially condemned female genital mutilation and still fewer have enacted legislation against the practice."<sup>159</sup> The FGM Alert also reports that even in countries where legislation has been acted against FGM, it is ineffective to fully protect women against the practice.<sup>160</sup> Furthermore, the FGM Alert states that "it remains practically true that [African] women have little legal recourse and may face threats to their freedom, threats or acts of physical violence, or social ostracization for refusing to undergo this harmful traditional practice for attempting to protect their female children."<sup>161</sup>

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153. See *Kasinga*, 35 I.L.M. at 1150.

154. See *id.* at 1151.

155. See *id.*

156. See *id.*

157. See *id.*

158. See *id.*

159. See *Kasinga*, 35 I.L.M. at 1151.

160. See *id.*

161. See *id.*

The record also contained the guidelines issued by the INS for adjudicating women asylum claims. Those guidelines state that "rape . . . , sexual abuse and domestic violence, infanticide and genital mutilation are forms of mistreatment primarily directed at girls and women and they may serve as evidence of past persecution on account of one or more of the five grounds."<sup>162</sup>

The parties agree without dispute that female genital mutilation as practiced by the tribe is persecution under the *Acosta* definition.<sup>163</sup> The Board recognized from past decisions that "persecution can consist of the infliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim."<sup>164</sup> The record reflected that FGM as practiced by the Tchamba-Kunsuntu tribe was of the most extreme nature. Thus, the Board agreed with the parties that this form of FGM met the requisite element of "persecution."<sup>165</sup>

### 3. Social Group

In accordance with *Acosta*, the particular social group is defined by common characteristics that members of the group either cannot change, or should not be required to change because such characteristics are fundamental to their individual identities.<sup>166</sup> The Board held that characteristics of being a "young woman" and a "member of the Tschamba-Kunsuntu Tribe" cannot be changed.<sup>167</sup> Thus, the characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it.<sup>168</sup>

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162. *Id.*

163. *See id.* However, the INS offered a framework that would include a "shocks the conscience" test for persecution. The INS notes the advantages of such a framework as follows: (1) the ability to define FGM as part of the victims' parents or tribe members who may well believe that they are simply performing an important cultural rite that bonds the individual to the society; (2) the ability to exclude other cultural practices, such as body scarring, from the definition of persecution as these do not shock the conscience; and (3) the ability to exclude past victims of FGM from asylum eligibility if they consented to it or at least acquiesced, as in the case of a woman who experienced FGM as a small child, since FGM would not shock the conscience unless inflicted on an unconsenting or resisting individual. *See id.* at 1154.

164. *Id.* at 1151.

165. *See Kasinga*, 35 I.L.M. at 1151.

166. *See id.*

167. *See id.*

168. *See id.*

#### 4. Well-Founded Fear

In *Mogharrabi*, the Board held that to establish a well-founded fear of persecution, the applicant has the burden of proving that a "reasonable person" in her situation would fear persecution if returned to her homeland.<sup>169</sup> The Board found that based on her testimony and supporting documents, Kasinga met her burden of establishing a well-founded fear of persecution.

#### 5. "On Account of"

The parties agree that FGM as described and documented in the record is to overcome sexual characteristics of young women of the tribe who have not been and who do not wish to be subjected to FGM.<sup>170</sup> The background materials support the finding that there is no legitimate reason for FGM.<sup>171</sup> FGM has been found as a form of sexual oppression that is based on the manipulation of women's sexuality in order to assure male dominance and exploitation.<sup>172</sup> The Board found that the persecution Kasinga fears in Togo is "on account of" her status as a member of the defined social group.<sup>173</sup>

#### 6. Country-Wide Persecution

One of the reasons for a remand the INS asserted is that Kasinga had not established that she would be unable to avoid FGM by moving to some other part of Togo.<sup>174</sup> Kasinga stated in her testimony that her husband was well known and is a friend of the police. Kasinga also testified that her aunt and husband were looking for her and would not stop until they found her. Togo is a small country and there would be no difficulty in locating her within that country.<sup>175</sup>

The record of the proceeding reflects two reports compiled by the United States Department of State. The first report, dated January 31, 1994, (1) confirms that FGM is practiced by some ethnic groups in Togo; (2) notes that while some reports indicate that the practice may

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169. See *id.* at 1152.

170. See *id.*

171. See *Kasinga* at 1152. Kasinga's prior counsel filed a prehearing brief which contained information about FGM. The documents confirmed the lack of legitimate justifications, its harmful effects on women and the practice's condemnation by such groups as the United Nations. The International Federation of Gynecology and Obstetrics, the Council of Scientific Affairs, the World Health Organization, the International Medical Association, and the American Medical Association. See *id.*

172. See *id.*

173. See *id.*

174. See *Kasinga*, 35 I.L.M. 1152.

175. See *id.*

be diminishing, an expert indicates that as many as fifty percent of Togolese females may have been mutilated; and (3) notes that various acts of violence against women occur in Togo with little police intervention.<sup>176</sup>

The second report, while not specifically addressing FGM, states that the president of Togo had a poor human rights record.<sup>177</sup> The government's military under the direction of the President had been involved in many human rights violations. The Board found that Kasinga's testimony was consistent with this record, that Kasinga could not find safety from FGM elsewhere in Togo, and concluded that she had a country-wide fear of persecution.<sup>178</sup>

#### 7. Discretion

The final issue the Board had to determine is whether Kasinga's applications deserved a favorable exercise of discretion. The Board noted that the danger of persecution will outweigh all but the most egregious adverse factors.<sup>179</sup> Thus, the Board found that FGM is a severe form of persecution and Kasinga deserved a grant of asylum.

### IV. CANADIAN POSITION

#### A. *IRB Gender-based Guidelines*

Whereas the United States has adjudicated asylum claims involving FGM victims through the evolution of statutes and case law, Canada has granted asylum claims mostly based upon gender related guidelines. Like the United States, Canada adopted the 1951 United Nations Convention relating to the Status of Refugees.<sup>180</sup> The Canadian Immigration Act, like the Convention, does not list gender as an enumerated ground for refugee status.<sup>181</sup>

In 1993, The Canadian IRB issued gender-based guidelines to deal with women refugee applicants.<sup>182</sup> The IRB Guidelines attempt to es-

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176. See *id.* at 1149 (quoting 103d Cong., 2d Sess., Country Report on Human Rights practices for 1993 (Joint Comm. Print 1994)).

177. See *Kasinga*, at 1149.

178. See *id.* at 1152.

179. See *id.*

180. See *id.* at 1152.

181. Immigration Act, R.S.C. ch. 28, sec. 2(1) (4th Supp. 1988). Refugee refers to any person who:

(a) by reason of a well grounded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion.

182. Immigration and Refugee Board, Women Refugee Claimants: Fearing Gender-Related Persecution, Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act (Ottawa, Canada Mar. 9, 1993) [hereinafter IRB Guidelines].

establish a nexus between gender and the fear the woman has of persecution. There are four issues that the guidelines seek to address.<sup>183</sup>

1. To what extent can women making a gender-related claim of fear of persecution successfully rely on any one, or combination, of the five enumerated grounds of the Convention refugee definition.<sup>184</sup>

Not all claims brought by women are gender-related.<sup>185</sup> The first determination that the Refugee Board must assess is the nature of the persecution feared by the woman.<sup>186</sup> In making this determination, the woman refugee should be classified by at least one of the four broad categories: (1) fear based on the same Convention grounds, and in similar circumstances as men;<sup>187</sup> (2) fear based upon kinship;<sup>188</sup> (3) fear resulting from severe discrimination pertaining to gender;<sup>189</sup> and (4) fear resulting from membership in a gender-defined social group.<sup>190</sup>

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183. *See id.*

184. *Id.* at 2.

185. *See id.* at 2. Women frequently claim fear of persecution that is similar to that of their male counterparts. However, the persecution they fear may be of the same nature or level of vulnerability. The disparity in fear of persecution may derive from the woman belonging to an ethnic or a linguistic minority, or membership in a political movement, a trade union or a religious domination. *See id.*

186. *See id.*

187. *See* IRB Guidelines at 3. The basis of persecution is not based on their status as women, but their particular identity that is focused upon their race, nationality, or membership in a particular social group. Furthermore, the risk factor may also derive from their particular beliefs pertaining to religion or political opinion. In these claims the substantive analysis does not alter based on the claimant's gender. *See id.*

188. *See id.* at 2. Such cases usually involve the woman being persecuted for the political activities of her family members, even though she herself has not been implicated in any of the activities. In an attempt to gain information concerning her families political activities, the female relative has often been persecuted. Even if the woman does not herself adopt the views and activities of her family, she is imputed with their political opinions and often has to suffer the consequences based only upon her familial relationship. *See id.*

189. *See id.* at 3. The persecution can be in the form of gender discrimination or violence emanating from the authorities or persons that the authorities have no ability to control. The actions attributed to the authorities or private citizens may be classified as persecution if it amounts to consequences of a substantially prejudicial nature or if it is imposed on account of any one of five enumerated grounds for persecution. *See id.*

190. *See id.* Woman may also be categorized by their inability or desire to conform to social, religious, or cultural norms which are gender biased. These customary practices, focus upon woman and make them more vulnerable than men. Examples of these social norms which women are accused of violating range from choosing their own spouses instead of accepting an arranged marriage, the visibili-



In applying the "membership in a particular social group" category as grounds for persecution, there are two primary considerations. First, a majority of the gender-related claims that involve fear of persecution for violating religious or social norms could be determined on grounds of political opinion or religion.<sup>191</sup> Second, for a woman to establish a well-founded fear of persecution by reason of her membership in a particular social group, the fact that the social group consists of large numbers of women is irrelevant.<sup>192</sup> However, producing evidence that corroborates that the particular social group suffers or fears to suffer discrimination or inhumane treatment "that is distinguished from the situation of the general population, or from other women" is relevant.<sup>193</sup> Regardless of the basis that the woman bases her fear of persecution, she will need to have a genuine fear of harm; gender is the reason for the harm feared; the harm feared is sufficiently profound to be considered persecution; a reasonable possibility that the feared persecution will occur if she is returned to her home country and she has no expectation for protection by the authorities.<sup>194</sup>

2. Under what circumstances does sexual violence, or a threat thereof, or other prejudicial treatment towards women constitute persecution as that term is jurisprudentially understood?<sup>195</sup>

The woman's fear of persecution is often unique to women.<sup>196</sup> The majority of the assessment of claims have been based largely upon the experiences of male claimants.<sup>197</sup> The fear of persecution has not

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ty or length of hair, or the type of the clothing the woman may choose to wear. In addition to grounds of persecution based upon membership in a particular social group, women may fear persecution based upon race, religion, nationality, or political opinion. *See id.*

191. *See id.* at 5. Despite the fact that it may appear that these claimants are making a religious or political statement, the UNHCR Conclusion No. 39 regards the particular social group category as the appropriate ground. The provision reads in part:

(k) Recognized that States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social norms of the society in which they live may be considered as a "particular social group" within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention.

*Id.*

192. *Id.* at 6. Factors such as race, religion, nationality and political opinion are attributes that could also be shared by large numbers of people. *See id.*

193. *See id.*

194. *See id.*

195. *Id.* at 7.

196. *See id.*

197. *See id.*

been inclusive of specifically female experiences, such as infanticide, genital mutilation, bride-burning, forced marriage, domestic violence, forced abortion, or compulsory sterilization.<sup>198</sup> The fact that the violent act is universally suffered by woman is irrelevant in determining whether the gender-specific crime constitutes persecution.<sup>199</sup> The primary issues are whether the harm feared is a violation of a fundamental human right for a Convention ground and whether the risk of the violence correlates to the failure of the state to protect the woman.<sup>200</sup> A woman can not claim that she is entitled to Convention Refugee status just because she is subjected to a national law to which she objects. The woman will need to establish that:

- (a) the policy or law is inherently persecutory; or
- (b) the policy or law is used as a means of persecution for one of the enumerated reasons; or
- (c) the policy or law, although having legitimate goals, is administered through persecutory means; or
- (d) the penalty for non-compliance with the policy or law is disproportionately severe.<sup>201</sup>

### 3. The Key Evidentiary Elements which are considered in a Gender-Related Claim.<sup>202</sup>

In assessing the claimant's claim of fear of gender-related persecution, the evidence must deduce that the fear is derived from a Convention ground as opposed to random violence or criminal activity executed against her as an individual.<sup>203</sup> The pivotal consideration in making this assessment is the woman's particular circumstances in relation

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198. *See id.*

199. *See id.*

200. *See id.* The social, cultural, religious, and traditional norms and laws that affect women should be assessed by reference to the numerous human rights instruments. These instruments provide a framework of standards which recognize the protection needs of women. The following instruments are universally recognized as guidelines for protection of women:

*Universal Declaration of Human Rights;*  
*International Covenant on Civil and Political Rights;*  
*International Covenant on Economic, Social and Cultural Rights;*  
*Convention on the Elimination of all Forms of Discrimination Against Women;*  
*Convention on the Political Rights of Women; and*  
*Convention on the Nationality of Married Women.*

201. *Id.* at 8.

202. *Id.*

203. *See id.*

to the human rights record of her country of origin and the experiences of other similarly situated women.<sup>204</sup>

4. The special problems women face when called upon to state their claim.<sup>205</sup>

The last issue addressed by the IRB Guidelines deals with some of the problems female claimants may experience, such as demonstrating their trustworthiness, when testifying at a determination hearing.<sup>206</sup> The IRB Guidelines recognize that women who are victims of sexual assault or violence may suffer from Rape Trauma Syndrome.<sup>207</sup> To alleviate any difficulties, CRDD members are directed to exhibit extreme sensitivity in these situation and if necessary, to utilize Refugee Hearing Officers who are specially trained to work with women who are victims of violence.<sup>208</sup>

*B. Canadian Case Law as Applying the IRB Guidelines: Case of Khadra Hassan Farah*

Khadra Hassan Farah is from the Isaac Tribe of Northern Somalia.<sup>209</sup> In 1980, Khadra and her family moved to Saudi Arabia.<sup>210</sup> Upon turning sixteen, Farah's father arranged for her to marry a man twenty years older than herself.<sup>211</sup> Khadra and her husband, Dahir Buraleh Ibrahim, remained in Saudi Arabia and had three children. After three years of marriage, Khadra asked her husband for a divorce which was strongly opposed by her parents.<sup>212</sup> In retaliation to this request, Dahir removed their eldest son from the home to live with his grandparents. Khadra has not seen her son since that day.<sup>213</sup> As a result of her request for independence, their marriage experienced frequent episodes of physical and verbal abuse.<sup>214</sup> Despite these conflicts, Farah remained with her husband because she feared that Dahir would take her two remaining children away from her.<sup>215</sup>

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204. *See id.*

205. *See id.* at 9.

206. *See id.*

207. *See id.*

208. *See id.*

209. Convention Refugee Determination Decisions No. T93-12198, 193-12199, T93-12197 at 1 (May 10, 1994).

210. *See id.*

211. *See id.*

212. *See id.*

213. *See id.*

214. Case Khadra Hassan Farah, (July 13, 1994) <<http://www.unhcr.ch/refworld/legal/refcas/hcr0117.htm>>.

215. *See id.*

In 1989, the family, excluding the eldest son, moved to the United States.<sup>216</sup> Khadra and her two children left her husband and moved to Canada in 1991.<sup>217</sup> On June 6, 1992, Dahir divorced Khadra and returned to Somalia.<sup>218</sup> Khadra sought refugee status in Canada on three distinct grounds. First, Khadra feared that if she returned to Somalia she would lose her parental rights to her children as she had lost her first child.<sup>219</sup> Second, if they returned to Somalia, her daughter would have to undergo female genital mutilation.<sup>220</sup> Finally, her son would be returned to his father to whom he had no parental affection. On May 10, 1994, the CRDD heard and decided Farah's case in order to determine whether she and her children were Convention refugees as defined in section 2(1) of the Immigration Act.<sup>221</sup> In accordance with the IRB Guidelines and International Human Rights instruments, the panel examined the gender-related evidence and applied the law to each applicant.<sup>222</sup>

First, Farah asserted that she and her children fit the definition of a Convention Refugee because she feared persecution on account of her membership in a particular social group: women. Khadra testified that her husband had strong ties to the government and that it would be impossible for her to escape his control if she were to return to Somalia.<sup>223</sup> Khadra's family no longer resided in Somalia; therefore, she would have no protection from her former husband.<sup>224</sup> Moreover, a divorced mother has no rights to her children under the Sharia law as applied in Somalia. Under the Sharia law, the divorced woman has to relinquish custody of her children to their father, because they are a part of the clan of their father.<sup>225</sup> Therefore, Khadra feared that she would lose custody of her two remaining children and furthermore, it would "destroy" her if she lost them.<sup>226</sup>

The CRDD found that Khadra's internationally protected rights as a parent had been violated.<sup>227</sup> Despite the fact that Somaliland has incorporated the Universal Declaration of Human Rights<sup>228</sup> into its "Na-

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216. *See id.*

217. *See id.*

218. *See id.*

219. *See id.*

220. Farah, at <<http://www.unhcr.ch/refworld/legal/refcas/hcr0117.htm>>.

221. *See id.*; Immigration Act, R.S.C. ch. 28, § 2(1) (4th Supp. 1988).

222. *See id.*

223. *See id.*

224. Farah, at <<http://www.unhcr.ch/refworld/legal/refcas/hcr0117.htm>>.

225. *See id.*

226. *See id.*

227. *See id.*

228. *Id.* The Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations on December 10, 1948. The specific articles which

tional Charter," it frequently violated the declaration by proclaiming that women automatically lost custody of their children upon divorce.<sup>229</sup> A divorced woman under Sharia law may fear persecution on account of her membership in this social group of women; therefore, Khadra was found to be a Convention refugee.<sup>230</sup>

Second, Khadra asserted that her ten-year-old daughter met the definition of a Convention Refugee because of her fear of persecution clearly relates to female genital mutilation.<sup>231</sup> If Khadra would have to return to Somalia, her daughter would have to undergo the procedure. Khadra testified that she had undergone the procedure when she was eight years old and described the procedure as excruciating.<sup>232</sup> Fur-

the board found to be violated are articles 7 and 16, which read in relevant part:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

*Universal Declaration of Human Rights*, G.A. Res. 217, U.N. Gaor, 3d Sess. U.N. Doc. A/810 (1948).

229. *See id.* The panel also found that Somaliland was in violation of articles 15 and 16 of the Convention on the Elimination of All Forms of Discrimination Against Women. The Convention was proclaimed by the General Assembly on November 7, 1967. Article 15 reads in relevant part:

1. States Parties shall accord to women equality with men before the law.

Article 16 reads in relevant part:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:...

(c) The same rights and responsibilities during marriage and at its dissolution;

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interest of the children shall be paramount.

*Convention on the Elimination of All Forms of Discrimination Against Women*, 34 U.N. Gaor Supp. (No. 21 at 193, U.N. Doc. A/34 (1979).

230. *See id.*

231. *See id.*

232. Testimony from the affidavit read as follows:

One afternoon, a group of women, including my mother and aunts, gathered at our house so that they could circumcise me and my cousin . . . I was told that it is a common thing and that it would enhance my chances of getting married to a good man . . . Two pairs of women grabbed me by legs and spread them wide open . . . Then, another lady started to get a new blade and took the cover off it . . . I felt the pain and started to scream. She cut

thermore, she has experienced health problems as a result of undergoing FGM. If returned to Somalia, Farah would lose custody of her children; therefore, she would be powerless in preventing FGM from being performed on her daughter.<sup>233</sup>

Despite the fact that FGM has been outlawed in Somalia since 1947, an estimated ninety-eight percent of Somali women have undergone the procedure.<sup>234</sup> FGM is an old custom in the country and is performed upon girls between infancy and adolescence.<sup>235</sup> In Somaliland the harshest form of FGM is practiced where certain parts of the genital organs are cut away and two sides of the vulva are stitched together.<sup>236</sup> Because of the unsanitary procedures, there are numerous health related consequences that result from this archaic procedure.<sup>237</sup>

As a result of this testimony, the CRDD found that forcing a minor female to undergo FGM would grossly violate her rights as protected by international human rights instruments.<sup>238</sup> The panel concluded in applying the IRB guidelines that the issues were related to gender.<sup>239</sup>

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off my clitoris with the blade and I screamed more . . . . She continued slicing away my labia minor, at which point I lost consciousness. Subsequently, she scraped raw the walls of my vulva and bound them together with thorns. She placed a stick between the raw walls of my vulva for 10 days . . . . Though this event took place over 20 years ago, I can still easily visualize the scene and feel the pain and trauma all over again when I start to talk about it.

Jennifer Bingham Hull, *Battered, Raped and Veiled*, N.Y. TIMES, Nov. 20, 1994.

233. *See id.*

234. *See id.*

235. *See id.*

236. *See id.*

237. *See id.*

238. *See id.* The Convention of the Rights of the Child was adopted by the General Assembly September 2, 1990. Article 3 reads in relevant part:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

*Convention on the Rights of the Child*, G.A. Res. 44, U.N. Gaor, U.N. Doc. A/44 (1989).

239. *See id.*

In Somalia, "infibulation is practiced on all females, almost without exception." Furthermore, the panel found that FGM as a custom violates Article 24 of the Convention of the Rights of the Child which proclaims that parties "shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children."<sup>240</sup> As a result of this violation and practice of FGM, the CRDD found that the Somalia government could not protect the minor child from FGM. The panel found that Khadra's daughter belonged to two social groups of minors and women; therefore, she may well fear persecution because of her membership in these groups.<sup>241</sup>

## V. CONCLUSION

By granting asylum to Fauziya Kasinga, the United States has taken a courageous position by publicly renouncing the practice of Female Genital Mutilation. The decision of the BIA is precedent which will guide 179 immigration judges in adjudicating like claims by women fleeing FGM. There are many opponents of this decision believing that this new precedent will open the "flood gates" to immigration to the United States. However, it must be acknowledged that the United States is a nation built upon the labor and lives of immigrants. If a massive exodus of women fearing FGM find their way to American shores, they should be protected by the laws that accepted immigrants from Italy, Germany, Ireland, and Poland.

Even though the United States has recently granted asylum to a woman fleeing FGM, Canada should be applauded as the world's first country to take a position against the ancient practice. Despite empirical evidence which finds that FGM is being practiced increasingly in the country, Canada has laid a humanitarian foundation and an analytical framework from which all countries can model their asylum law jurisprudence.

In conclusion, the United States and Canada both use distinct modes of asylum jurisprudence; however, they both conclude with the same humanitarian solution. The inscription on the base of the Statue of Liberty depicts the United States as the "Mother of Exile." The United States has once again made itself worthy of the title. Women fleeing FGM should deem the United States and Canada as safe havens from the atrocities of Female Genital Mutilation.

*TiaJuana Jones-Bibbs*

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240. *See id.*

241. *See id.*